IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 43

LESTER J. ALBRECHT,
Petitioner,

vs.

THE HERALD COMPANY, a Corporation, d/b/a GLOBE-DEMOCRAT PUBLISHING COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

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CONSTITUTIONAL PROVISION INVOLVED.

U. S. Constitution, Amendment VII:

In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

ARGUMENT.

I.

Concerning the Petition and the Record.

The petition in this case advances one single "Question Presented" reading as follows (Pet. 2):

> "Whether as a matter of law a newspaper's actions of soliciting away the customers of one of its independent merchant carriers in order to induce him to comply with the suggested resale price and then terminating sales to him for his continued refusal to agree to comply are in violation of Section 1 of the Sherman Act."

Under Rule 23.1 (c) of this Court, review of all matters not fairly comprised in this question is abandoned.

1.

At the trial petitioner abandoned his charges of *conspiracy* and *collusion* against defendant and amended his complaint to eliminate these words, and their derivatives, wherever they appeared in that pleading, "In order," he said, "to conform to the evidence" (R. 110, 111). Petitioner's motion to amend, which was opposed by respondent, but granted by the trial judge, was filed *after* the evidence was all in, and while court and counsel were making up the charge (R. 109). Presumably, petitioner and his counsel, after all the evidence had been heard, were capable of judging finally whether there was any submissible evidence of conspiracy, collusion or agreement between defendant and "a person or persons unknown to plaintiff" (R. 7). Since the hasty motion to amend neglected to eliminate also the allegation that the conspiracy was "accomplished and brought about by contracts, agree-

ments and understandings",—words appropriate to a conspiracy, but not to a combination,—the following colloquy occurred (Supp. R. 2):

> "Mr. Hocker: What are you going to do with the words 'contract, agreement and understanding' that appear in Paragraphs 18 and 19? Are they deleted or left in?
>
> "Mr. Siegel: They are left in. Apparently there is no evidence, I guess, of any illegal agreements or contracts, except if they are illegal by constituting a combination. That aspect remains in."

The double-talking exception made no impression on the trial judge, who instructed the jury, without objection from petitioner, that petitioner had abandoned not only the charge of conspiracy and collusion, but also the charge that the conspiracies were accomplished and brought about by illegal contracts and agreements (R. 125).

The amendment, filed far too late for a motion to make more definite and certain, or for clarification by interrogatories or deposition, substituted for the charge of conspiracy *"with a person or persons unknown"* (Complaint, par. 19, R. 7), the charge of combination with "plaintiff's customers" [there were 1201 of them, R. 38] "and/or Milne Circulation Sales, Inc." [who for a fee solicited subscribers for respondent, R. 64, 65], "and/or George Kroner" [to whom respondent later gave the list of subscribers it had obtained, R. 72, 73].

Neither in the trial court, nor in the Court of Appeals, nor in his petition in this court has the petitioner specified which of the class of 1203 he identified in his amended complaint he thinks that the court should have ruled, as a matter of law, that the defendant combined with.

We think, for reasons set out in detail in our brief in the Court of Appeals, that petitioner totally failed to

prove a combination with any one of the 1203 members of the class named in the complaint. The Court of Appeals so held (Petition p. 26).

But the significant point in *this* court is that by the Question Presented as stated in this petition the petitioner has now abandoned the allegation of *combination,* as well as that of conspiracy.

The Question Presented predicates *unilateral action only* by respondent. Neither conspiracy, nor collusion, nor contract, nor agreement, nor understanding, nor combination with *any person* is supposed in the question.

The Question Presented asks only whether a newspaper publisher may solicit away customers and terminate sales to a carrier without violating Section I of the Sherman Act.

Since Section I of the Sherman Act, 15 U. S. C. 1, requires either a "contract, combination in the form of trust or otherwise, or conspiracy", as a constitutive element of the acts it forbids, this crime cannot be committed *in vacuo,* so to speak. As it takes two to Tango, it takes two to violate Section I of the Sherman Act.

Of course, the paradoxical question of law proposed in the Question Presented, i. e., of single-handed combination, was not pleaded in the trial court (R. 6, 7), nor was it raised in the Court of Appeals. In both courts below, the petitioner conceded respondent's right to refuse to deal with petitioner unilaterally under the rule of U. S. v. Colgate, 250 U. S. 300.

In the trial court, petitioner offered, and in the Appellate Court complained of the refusal of, an instruction reading as follows (R. 120, 113) (App. Br. 38, 66, 28):

"Instruction No. 26.

"The Court instructs you that when a seller does no more than announce a resale price policy and a declination to sell to those who fail or refuse to adhere to such policy, he has not put together an unlawful combination. If, however, the seller goes further and *engages in actions with one or more persons,* extending beyond the bare announcement of his resale price policy and a declination to sell, in order to effect adherence to his resale price policy, then he has engaged in an unlawful combination in violation of the antitrust laws."

Thus the "Question Presented" is not before the court in this record.

2.

The "Question Presented" states facts not supported in the record.

There was no evidence that respondent refused to deal with petitioner *"for his continued refusal to agree to comply" "with its suggested resale price",* as the question states.

Actually, respondent continued to sell petitioner the newspapers, with which he competed, throughout the period during which it solicited his overcharged customers (R. 42).

The evidence, and the only evidence, of the cause of respondent's "terminating sales to" petitioner was respondent's letter of August 20, 1964, reading as follows (R. 48):

"Dear Mr. Albrecht:

"We have received a copy of the Complaint you have filed in the U. S. District Court asking damages

from us in the amount of three hundred forty thousand dollars.

"It seems apparent that the prosecution of this action is clearly inimical to the purpose for which your appointment as carrier was made and you are hereby notified that your appointment as carrier is terminated.

"However, in accordance with our statement of policy, we will nevertheless give you the opportunity of producing a substitute whose credit, experience and efficiency is satisfactory to us, and we will not object to his appointment that he may be paying you in connection therewith. Under the circumstances, with the lawsuit pending, we believe that sixty days is a reasonable time for this purpose.

"Accordingly, we shall cease selling you newspapers on October 21st, 1964. In the meantime, we will be ready to interview any substitute you may wish to produce.

Yours very truly,

Walter D. Evans,
Circulation Director."

3.

Petitioner's Question Presented turns wholly on whether the lower courts committed error in failing to declare a Sherman Act violation "as a matter of law".

There were only two opportunities for making the ruling as a matter of law: on the motion for summary judgment and on the motion for a directed verdict.

But no error in the ruling on the motion for summary judgment was preserved on the appeal; for petitioner amended his complaint twice prior to submission and after the motion for summary judgment was decided (R. 20,

R. 110, 111). Therefore, the complaint in *this* record is not, in significant respects, the complaint on which the summary judgment was sought. And in the second place, *what petitioner appealed from was not the ruling on the motion for summary judgment, but the judgment on the jury verdict of May 13, 1965* (R. 138).

Consequently, the only asserted error to which the answer to the question could be relevant is the refusal to grant the plaintiff's motion for a directed verdict. And on the record as it then stood, to grant this motion was simply impossible.

The complaint, after the last-moment amendment, predicated liability for violation of the Sherman Act (Par. 19 as amended, R. 6, 7, 110, 111) upon the allegation that defendant had entered into combination with

> "plaintiff's customers and/or Milne Circulation Sales, Inc. and/or George Kroner . . . and were accomplished and brought about by contracts, agreements and understandings between the Publisher and plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner."

The designation of the defendant's accomplice or accomplices as "plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner" was made by amendment, voluntarily, after the close of the evidence, "to conform to the proof" (R. 109, 110, S. R. 2).

The disjunctive "or", by definition, postulates alternatives. Pleading in the alternative is permissible in modern practice (Rule 8e 2, F. R. C. P.), because there may be sufficient evidence to justify the trier of the facts in finding the truth in any one of several hypotheses, even though mutually exclusive. But if a plaintiff cannot himself specify the wrongdoing more confidently than as one of 1203 mutually exclusive alternatives,—or 3, for that

matter,*—how can he find error in a court's unwillingness to declare it to consist of a particular alternative *as a matter of law*?

Obviously, he may not. The alternative pleader must submit his alternatives to the jury and be content to have it select the truth from the pleaded and possible alternatives. And he must ask this determination *as a finding of fact*, not *as a declaration of law*.

This is what was done, and the jury found as a fact that no such combination existed. To re-examine that finding of fact here would be a violation of U. S. Constitution, Amendment 7; because no error in the presentation of the issue to the jury is supposed in the Question Presented.

II.

Concerning the Merits of the Judgment.

While we are content to rely upon the opinion of the Court of Appeals as to the merits of the judgment, it may be well to point out one additional fact.

In U. S. v. Parke-Davis & Co., 362 U. S. 29, 80 S. Ct. 503, upon which petitioner stakes his entire reliance, this court epitomized the whole of Sect. 1 of the Sherman Act in the traditional ten words of the "straight" telegram. It said (l. c. 44, 512):

> "The Sherman Act forbids combinations of traders to suppress competition."

Who is the *trader* with whom respondent is charged to have combined?

Petitioner alleged in his amended complaint (R. 111) that the respondent combined with

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* Actually, since the pleading is "and/or", the possible alternatives are any combination of one or more of the group; approaching the *square* of 1203, or seven, even if we regard the 1201 customers as one, i. e., A, B, C, AB, AC, BC, or ABC.

"plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner . . . and were accomplished and brought about by contracts, agreements and understandings between the Publisher and plaintiff's customers and/or Milne Circulation Sales, Inc., and/or George Kroner."

It was not shown that any of the plaintiff's customers were traders. Nor was Milne Circulation Sales, Inc., which on a fee arrangement did the solicitation the respondent ordered it to do. None of these people traded in newspapers, or in anything else for that matter. Furthermore, under petitioner's complaint, they were not possible co-combinees anyway; because in Paragraph 18 petitioner alleged that respondent's combinations had been "with a person or persons engaged in the newspaper carrier business" (R. 6), and none was shown to have been in that business. But, neglecting pleadings for the trend of this argument, none was a trader.

All of the cases petitioner cites involve combinations with traders-wholesalers, retailers, distributors or dealers. So far as the opinions petitioner cites disclose, no one has ever claimed before that a combination in the form of trust or otherwise can exist between a manufacturer and his ultimate consumer, for whose benefit the law was designed. Nor between the manufacturer and its telephone operator, or its solicitor. Such people are not, as this court has said co-conspirators or co-combinees must be, TRADERS.

That leaves George Kroner. He was a trader. And of all the 1203 alleged possible co-combinees, Kroner was the only one "engaged in the newspaper carrier business".

Now the charge urged by petitioner below (Plaintiff's Requested Instruction No. 16, R. 113) requires that the combination be one beginning "on or about May 20, 1964".

Kroner, a witness called by the petitioner, had nothing to do with the matter until July, when he saw the defendant's advertisement in the newspaper (R. 75). Thereafter, all he did on Albrecht's old route was to deliver to the customers on the list given him by the Globe-Democrat, at the regular subscriber's rate, from the middle of July, 1964 (R. 78) until December, 1964 (R. 80), when he sold this route to Schwarzenbach (R. 80), who had bought Albrecht's route the previous September 25 (R. 51, 52).

There is no evidence whatever that Kroner ever combined in any way with defendant. He acquired the customers from it *after* it had obtained them by price and service competition. And he was not shown to have had anything whatsoever to do with Albrecht's termination by defendant in November, 1964, which was the subject matter of the Supplemental Complaint.

There was utterly no evidence of a coercion of Kroner, and utterly no evidence that anything that Kroner did had anything to do with appellant's asserted damage. He answered defendant's advertisement and took over delivery to the 314 daily and 260 week-end subscribers (R. 73). He never solicited any persons to become his customers on this route (R. 79). He had previously been a Globe-Democrat carrier (R. 72) and had only a verbal understanding with them "That I was to handle that the same as I did Route 48. I was pay my bills weekly and bill the customers according to the prescribed rate" (R. 74). At this time he was not told the prescribed rate; as he already knew it (R. 74). He had previously been told that the Globe-Democrat would not tolerate overcharging the customers (R. 75). This was no more than the unilateral declaration of unilateral policy permitted by the Colgate rule, and knowing the policy Kroner took on the new route and customers. He did charge the regular prescribed rate (R. 79).

Even petitioner foreswears interpreting any of the testimony as showing any coercion of Kroner, or of any other carrier. At Par. 9 of his brief in the Court of Appeals, Petitioner said:

> "*Other than in the case of plaintiff, the Publisher has taken no other steps to enforce maintenance of the suggested retail price* except to contact carriers whose subscribers have called to the Publisher's attention the fact that carriers were not charging defendant's suggested price, and then the Publisher requested them to do so."

As the only "trader" with which respondent is accused of combining was Kroner, and since Kroner had nothing to do with the acts which petitioner claims damaged him, it is clear that even if petitioner could lure back Omar's moving finger to cancel and rewrite his complaint, his submission at the trial, his brief on appeal, and his petition for certiorari, and if petitioner could, by his tears wash out the jury verdict, yet, even so, petitioner could never on the facts, as he proved them himself, be entitled to the relief he seeks.

The petition should be denied.

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